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Supreme Court of the United States

OCTOBER TERM, 1964.

No. [redacted] 70

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

versus

I. E. SCHILLING CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1057.

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

versus

I. E. SCHILLING CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PRELIMINARY STATEMENT.

Respondent opposes the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 12, 1965, which affirmed a damage judgment

rendered in the action brought by Respondent under § 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187. Pursuant to Rule 40, paragraph 3, of the Rules of this Honorable Court, Respondent adopts as correct the statements contained in the Petition for Writ of Certiorari with respect to Opinion Below (Petition, p. 2) and Statute Involved (Petition, p. 3).

JURISDICTION.

The Supreme Court of the United States has jurisdiction to review this decision entered herein by the United States Court of Appeals for the Fifth Circuit, but Respondent respectfully submits that in the exercise of sound judicial discretion this Honorable Court will deny review since the decision of the United States Court of Appeals for the Fifth Circuit does not conflict with the decision of any other United States Courts of Appeal, does not decide issues not already decided by this Honorable Court, and is not in conflict with any decisions of this Honorable Court.

QUESTIONS FOR DECISION UPON PETITION FOR CERTIORARI.

1.

Whether or not sound judicial discretion will allow a writ of certiorari herein when the decision of the court below does not decide any issue not already decided by the Supreme Court of the United States, does not conflict with any decisions of the Supreme Court of the

United States and does not conflict with the decision of any other United States Courts of Appeal?

2.

Whether or not the National Labor Relations Board has primary jurisdiction of an action brought in a United States District Court under the provisions of § 303 of the Labor Management Relations Act?

3.

Whether or not there was an evidentiary basis to support the verdict of the jury in the trial court?

4.

Whether or not a *per se* doctrine is determinative of the legality, under § 303 of the Labor Management Relations Act, of a union's ambulatory picketing of an employer?

5.

Whether or not attorney's fees are recoverable in a § 303 action?

STATEMENT OF THE CASE.—

Respondent, a supplier of ready-mixed concrete, was engaged in supplying concrete to the Eastern Air Lines job at the International Airport, Miami, Florida (R.44-45). Respondent was a non-union firm (R.73-74). Other em-

ployees working on the Eastern Air Lines job were "one hundred per cent union" (R.72, 157-158), ten or twelve crafts were operating on the job and a total of about 600 men were employed (R.54-55).

Maule Industries, one of the Respondent's competitors which had a contract with petitioner labor organization, was also supplying concrete to the Eastern job (R.45, 76). The general contractor, J. A. Jones Construction Company, was entirely satisfied with Schilling's service, but felt that Maule was not providing standard service (R.46). Accordingly, J. A. Jones cancelled its purchase order with Maule (R.17) and began using Schilling exclusively as its concrete supplier (R.48). Petitioner made no effort to get the contractor to cease doing business with Schilling until after the cancellation of the Maule contract (R.70, 71).

Twelve days after the contractor stopped using Maule concrete, on May 16, 1965, a Teamster picket appeared at the gate designated by Eastern Air Lines as the contractor's source of entry to the site (R.46-48, 63, 117-118), at a time when Schilling trucks were on the job (R.47). The picket picketed on a sidewalk about 75 feet from the gate (R.184-185), and picketed only when Schilling trucks were inside (R.174). On this occasion, there were no pickets at Schilling's plant, its primary place of business (R.76). The picket sign read (R.148):

"TRUCK DRIVERS
OF
I. E. SCHILLING COMPANY
COME AND JOIN US.
TEAMSTERS LOCAL 290"

Everyone ("our craftsmen") left the job (R.46), and the remainder of the concrete order for the day was cancelled (R.48). About a week later (no concrete having been ordered in the intervening period), at a time when Schilling trucks were on the job, the Teamster picket appeared again, picketing as before, and approximately 600 men left the job (R.48-49).

Thereafter, the contractor discontinued ordering concrete from Schilling and began ordering from Acme Concrete Supply, first being assured by Acme that it used Teamster drivers (R.52-53). The only factor leading to the change in concrete suppliers was the contractor's need "to get the job in full production again" and that Schilling could not supply the job without labor difficulties (R.53, 68-69). Incidentally, Acme's service was not the excellent service provided by Schilling (R.54).

On the Eastern job the Schilling drivers engaged in pouring concrete could not see the Teamster picket (R.185). From the point at which the Teamster picket picketed the Eastern job, the area where the Schilling truck was pouring was not visible because there was a row of construction building offices blocking the view (R.77, 133). At the gate to the Eastern job, the picket was stopped by a guard (R.173), but no effort was made by Petitioner's representatives to secure permission from the general contractor or anyone in a position of authority to enter the premises.

Schilling had twenty-five hourly paid employees (R.123-124), who reported to the company's primary place of

business, its plant each morning. On an average, the drivers made four to six trips each day delivering concrete (R.92-93). At the plant itself, a picket picketed "periodically" as contrasted to "constantly"; the picket ". . . would sit in the car some and then he would picket some" (R.79-80).

Job sites other than the Eastern job site were picketed, but generally if the construction employees failed or refused to walk off the job, the picket did not return (R.104, 106, 124-129).

On May 23, 1962, Schilling filed a petition for an election with the National Labor Relations Board and filed unfair labor practice charges alleging violation of Section 8(b)(4)(ii) of the Act. An N.L.R.B. election was held on June 8, 1962. The General Counsel of the N.L.R.B. sustained the ruling of the Regional Director, refusing to issue an unfair labor practice complaint (R.138-142). Picketing ceased on May 21, 1962 (R.201).

The jury rendered a verdict in favor of Schilling for damages in the amount of $10,411. The Fifth Circuit Court of Appeals remanded the case for new trial unless Schilling filed a remittitur within thirty days for $2,161.73, in which case the judgment was affirmed. A remittitur was duly filed and the judgment stood affirmed. The appellate court thus ruled that there was evidence from which the jury could infer unlawful conduct.

REASONS FOR REFUSING TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

POINT ONE.

THIS COURT HAS ALREADY REJECTED THE ARGUMENT THAT THE LANDRUM-GRIFFIN AMENDMENTS TO SECTION 303(a)(29 U.S.C. Section 187 (a)) REQUIRE RESORT TO N.L.R.B.'S PRIMARY JURISDICTION TO ESTABLISH THE EXISTENCE OF AN UNFAIR LABOR PRACTICE AS A PREREQUISITE TO A DAMAGE SUIT UNDER THE PROVISIONS OF SECTION 303.

Contrary to Petitioner's contention this is not the first case in which this Court has had an opportunity to determine the effect of the Landrum-Griffin Amendments with respect to § 303 (29 U.S.C. § 187). *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964), involved a suit brought by an employer under § 303 and under the common law of Ohio. In affirming the award of compensatory damages for the violation of § 303, this Court made the following observation:

> Section 303(b) of the Labor-Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in § 303(a) comprehensively and with great particularity "described and condemns specific union conduct directed to specific objectives." Carpenters Local 1976 v. Labor Board, 357 US 93, 98, 2 L.Ed. 2d 186, 1193, 78 S. Ct. 1011.

Additionally, in footnote 13 the Court, it is respectfully submitted, disposed of Petitioner's contentions concerning the effect of the Landrum-Griffin Amendments:

> Section 8(b)(4), 29 USC § 158(b)(4), and 303, 29 USC § 187, "having an identity of language" but specify two "different remedies." Longshoremen v. Juneau Corp. 342 US 237, 244, 96 L.Ed. 275, 281, 72 S. Ct. 235. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct under § 303 *also* gives rise to a claim for damages cognizable in either state or federal courts. *As a consequence of the 1959 amendments to the Act, § 303 now incorporates by reference the prohibitions embodied in § 8(b)(4).* (Emphasis supplied.)

This Court considered at some length the contention here raised by Petitioner in *International Longshoremens' and Warehousemens' Union vs. Juneau Spruce Corp.*, 342 U.S. 237 (1952), and in rejecting the contention the Court stated:

> The main contention of petitioners in the case is that § 303(a)(4) read in light of § 8(b)(4)(D) renders illegal only such picketing as takes place after and in face of a determination by the Board that acts complained of were unfair labor practices. . . .
>
> Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4) to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided

were to be independent of each other. Certainly there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather the opposite seems to be true. . . . (342 U.S. at 243-44.)

N.L.R.B. v. Radio & Television Broadcast Engineers' Union, 364 U.S. 573 (1961), was decided after the Landrum-Griffin Amendments, and in this case this Court adhered to its decision in *Juneau Spruce Corp., supra*, stating:

> A second inconsistency is urged with § 303(a)(4) of the Taft-Hartley Act, which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that since § 303(a)(4) does not permit a union to establish, as a defense to an action for damages under that Section, that it is entitled to the work struck for on the basis of such factors as practice or custom, a similar result is required here in order to preserve "the substantive symmetry" between §303(a)(4) on the one hand and §§ 8(b)(4)(D) and 10(k) on the other. This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem. . . . (364 U.S. at 584-85.)

Petitioner finds "sparse" legislative history to support its contention. While pertinent legislative history may be sparse, it establishes that this Court's interpretation in *Morton, supra*, is correct. Representative Lafore, in offering an amendment to § 303, which embodied in essence, the language finally adopted, commented:

> Section 303 of the present Taft-Hartley Act is the section which provides for damages resulting from the unfair labor practices set out in § 8(b)(4). My bill makes no change in the overall idea of § 303. It merely streamlines it and brings it into conformity with the new changes in § 8(b)(4).
>
> The present § 303(a) is eliminated as repetitious and unnecessary. It is covered by reference to avoid repeating all the unfair labor practices set out in § 303(b) of the present law. 105 CONG. REC. 3512, (daily ed. March 11, 1959).

In view of this Court's decision in *Juneau Spruce, supra,* had Congress intended to vest primary jurisdiction in the N.L.R.B. in the case of § 303 damage suits, it would have used plain and unambiguous language to accomplish this purpose.

Finally, in support of the rule established by this Court is the fact that decisions of the General Counsel of the N.L.R.B. are not reviewable. *Hourihan v. N.L.R.B.,* 201 F.2d 187 (D.C. Cir. 1952), cert. denied 345 U.S. 930 (1953); *Dunn v. Retail Clerks Int'l Assoc.,* 307 F.2d 930 (6th Cir. 1962). To sustain Petitioner's contention would mean that the Respondent would never have its day in court.

Clearly, Congress did not intend, nor did it amend the law so as to make an N.L.R.B. finding (that the conduct of which an employer complains was an unfair labor practice), a prerequisite to such employer maintaining a § 303 damage suit.[1]

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[1] At Pages 13-14 of its petition, Petitioner cites and quotes from an article by Professor Louis L. Jaffe in *Primary Jurisdiction,* 77 HARV. L. REV. 1037 (1964). In another portion of this article, Professor Jaffe approves the action of Congress and

POINT TWO.

THERE IS AN EVIDENTIARY BASIS FOR THE JURY'S VERDICT, AND THE COURT BELOW CORRECTLY AFFIRMED THE JUDGMENT.

This Court has firmly stated that where there is an evidentiary basis for the jury's verdict, the jury is free to discredit and disbelieve whatever facts are inconsistent with its conclusion. *Dennis v. Denver & Rio Grande Western R.R. Co.*, 373 U.S. 208 (1963); *Lavender v. Kurn*, 327 U.S. 645 (1946).

Certainly the jury in the trial court had an evidentiary basis for rendering a verdict against Petitioner;

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this Court with respect to concurrent jurisdiction by the Courts and the N.L.R.B.:

> The conflicts so glibly supposed to follow from the excesses of parallel and concurrent jurisdiction by courts and agencies have not proved, in the case of the NLRB, sufficiently consequential to justify an exclusion of court jurisdiction. At one time the Supreme Court thought even the remotest possibility of conflict sufficient to oust the jurisdiction of state courts. This point of view on the one hand overstates the likelihood and significance of conflicts and on the other sets up an unreal goal of doctrinal and factual harmony. Moreover, a federal agency's resources of money, time, and men are rarely adequate to its farflung jurisdiction, and this exaggerated application of the doctrine of preemption created a no man's land of cases which the state courts were forbidden to handle and the Board could not. In response, Congress in the Taft-Hartley Act authorized the federal courts to enforce collective bargaining agreements and more recently has qualified preemption in this area by allowing state courts to exercise their traditional jurisdiction when the NLRB declines. . . . The Supreme Court has now wisely decided to allow the exercise of court jurisdiction despite the presence of potential NLRB jurisdiction, at least in the absence of "serious problems" of conflict. It is to be hoped that in the exercise of this jurisdiction it will seldom be necessary to invoke the doctrine of primary jurisdiction. (Footnotes Omitted.)

(1) No picketing occurred until *after* the contract of another supplier, with whom Petitioner had a collective bargaining agreement, was terminated by the general contractor because of unsatisfactory service.[2]

(2) Despite its alleged purpose of picketing for organizational purposes, the picketing at the Eastern job site could not be seen by Schilling's drivers except for a few seconds as they drove in and out the gate.

(3) The picketing at the Eastern job site caused about 600 men to leave their jobs; as a result of the picketing the general contractor ceased to do business with Schilling.

(4) The picket at Schilling's plant—its primary place of business—picketed in a lackadaisical manner, sitting in his car at times, even though *all* Schilling drivers entered and left the plant eight to twelve times per day (each driver averaged four to six trips per day in and out of the plant.)

(5) On job sites other than the Eastern job, the picket would leave when the secondary employees did not walk

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[2] That the jury chose to disbelieve "undisputed" evidence, contrary to Petitioner's position, was not sufficient to cause the Court below to reverse. *Ellis v. Union Pac. R.R. Co.*, 329 U.S. 649 (1947). The testimony of Union president Alden that he never knew or heard that one of his union companies had been run off a large job strains credulity (R.201, 205).

Petitioner is dissatisfied because the jury, with an evidentiary basis for its verdict, did not believe union president's Alden's testimony and concluded that the picketing was for an unlawful object. "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results were more reasonable." *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

off. Once a job had been picketed, if secondary employees did not walk off, the picket would not return.

(6) Petitioner took no action to attempt to secure permission to picket Schilling's drivers while they were on the Eastern job site nor did the pickets make any effort to prevail on the secondary employees to continue working.

POINT THREE.

THERE IS NO *PER SE* RULE FOR DETERMINING THE LEGALITY OF PICKETING WHICH INDUCES SECONDARY EMPLOYEES TO RESPECT A PICKET LINE.

This Court has recognized that there is no rigid rule which would make a few factors *conclusive* in determining the legality of picketing which induces secondary employees to respect a picket line. *Electrical, Radio & Machine Workers Local 761 v. N.L.R.B.*, 366 U.S. 667, 672 (1961). The Court observed that mechanical application of the *Moore Dry Dock* tests resulted in a presumption of illegal activity when a violation of one of the standards occurred. *Local 761, supra,* at p. 677. The same reasoning compels the conclusion that mechanical application of the Dry Dock tests legalizes conduct which, measured by other factors, is clearly violative of the statute.

Yet, Petitioner here argues vehemently for a *per se* rule. Parenthetically, in *N.L.R.B. v. General Drivers, Warehousemen & Helpers, Local 968,* 225 F.2d 205 (5th

Cir. 1955), one of the Petitioner's distinguished law firms argued (in behalf of another division of the International Brotherhood of Teamsters) just as vehemently, and successfully, that the *Moore Dry Dock* tests should not be mechanically applied.

The N.L.R.B. itself, in *Plauche Electric, Inc.*, 135 N.L.R.B. 250 (1962), avowed its intention *not* to adopt a *per se* rule:

> These standards also are not to be applied on an indiscriminate "per se" basis, but are to be regarded merely as aids in determining the underlying question of statutory violation. 135 N.L.R.B. at 255.

Interestingly enough, in the light of Petitioner's vitriolic attack on the Fifth Circuit, it was the decision of the Fifth Circuit, in *N.L.R.B. v. General Drivers, etc.*, 225 F.2d 205 (5th Cir. 1955), among others, which led the Board in *Plauche, supra,* to overrule its *Washington Coca Cola*[3] decision, (135 N.L.R.B. 253).

The evidence from which the jury could and did conclude that a purpose of the Teamster picketing was to induce the secondary employees to engage in a concerted refusal to work for the object of forcing J. A. Jones to cease dealing with Schilling has been summarized above. Admittedly, the picketing at the Eastern Air Lines job site was carried on for the most part at times when the Schilling drivers could not see the picket. Petitioner made no effort to secure permission to picket the Schilling

[3] 107 N.L.R.B. 299, *enf'd.* 220 F.2d 380 (D.C. Cir. 1955).

trucks or the job site. These factors, considered alone, justify the conclusion that the *Moore Dry Dock* tests were not met since one test is that the picketing be limited to places reasonably close to the location of the situs. Should the Court decide that the *Moore Dry Dock* tests were met, the evidence certainly established other factors which could be considered by the jury in determining the underlying question of statutory violation.[4]

POINT FOUR.

ATTORNEY'S FEES INCURRED IN ATTEMPTING TO REMOVE THE PICKET LINE ARE A PROPER ELEMENT OF DAMAGE.

Petitioner cites no authority or reason justifying this court's review of the damages awarded by the jury but merely states that attorney's fees incurred by Schilling in removing the picket line are not damages sustained!

It is a well recognized rule that the amount of damages to be awarded is a question of fact for decision by the jury and the court will not substitute its judgment for the verdict unless it is apparent that the jury acted under some bias, prejudice, or improper influence. *Jones v. Atlantic Refining Co.*, 55 F. Supp. 17 (D.C. Pa. 1944).

The Sixth Circuit Court of Appeals awarded attorney's fees in a § 303 action where the employer sought the removal of a picket line. The court in *International Brother-*

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[4] See summary of evidence stated by the Court of Appeals 340 F.2d 288-89, Appendix pp.8a-11a, Petition for Writ of Certiorari.

hood of Teamsters, Local 984 v. Humko Co., Inc., 287 F.2d 231, 243 (6th Cir. 1961) states:

> The $1,000 attorney fee paid by Humko in assisting Kuhne in the removal of the picket line at Champaign, as well as the $1,000 attorney fee paid by Kuhne in filing the charge with the National Labor Relations Board to bring about the removal of the picket line so that they could proceed with the completion of the construction contract, are proper items of damage.

The jury's verdict below and the appellate court's affirmance of the attorney's fee as an item of damages sustained by Schilling provide no ground for granting the petition in this case.

CONCLUSION.

For the reasons set forth above the writ of certiorari should not be granted.

Respectfully submitted,

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